



# ***CITY COUNCIL AGENDA REPORT***

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MEETING DATE: OCTOBER 19, 2009

ITEM NUMBER: VII.4

SUBJECT: URGENCY ORDINANCE CODE AMENDMENT OF THE COSTA MESA MUNICIPAL  
CODE REGARDING MEDICAL MARIJUANA DISPENSARIES

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DATE: OCTOBER 15, 2010

FOR FURTHER INFORMATION CONTACT: KIMBERLY HALL BARLOW, CITY ATTORNEY  
(714) 754-5152

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## **PROJECT DESCRIPTION**

City staff is bringing a Zoning Code amendment to the City Council, after a public hearing and recommendation for adoption by the Planning Commission, for the City Council's review and adoption. This urgency ordinance amends the City's regulations regarding medical marijuana dispensaries and would take effect immediately upon adoption by the City Council.

## **RECOMMENDATION**

Adopt the proposed urgency ordinance code amendment.

## **BACKGROUND**

The City adopted a ban on medical marijuana dispensaries in 2005. This area of the law is in constant flux. Therefore, the City's Zoning Code provisions need to be updated as new legal information emerges.

## **ANALYSIS**

The proposed urgency ordinance would implement the following changes to the current Zoning Code:

1. The ordinance would modify the definition of a medical marijuana dispensary. Currently, the Zoning Code defines a dispensary as one or more individuals cultivating, distributing or otherwise making available medical marijuana. The proposed modification would change the definition to apply to **three** or more individuals cultivating, distributing or otherwise making available medical marijuana. In addition, the definition would be modified to explicitly indicate that this definition includes "any facility or location engaging in the retail sale, dispensation, or distribution of marijuana for medical purposes that does not have an active role in the cultivation of the marijuana product that it sells, dispenses, or distributes, or when its cultivation of the marijuana product is off-site from the facility or location for retail sale, dispensation, or distribution."

The above definitional changes are based upon the Court of Appeal opinion in *Qualified Patients' Association v. City of Anaheim*, Case No. G040077. In the Court's recently published opinion, it indicated in the non-binding portion of its analysis that it may be justifiable for cities to prohibit medical marijuana dispensaries based upon the manner or number of persons engaging in such activities on a single premise. In addition, the City has been enforcing its current medical marijuana dispensary prohibition against multiple individuals engaging in such activities, in store-front dispensaries. Therefore, the above proposed changes will not impact the current enforcement the City has been conducting against such facilities.

2. The proposed ordinance also would modify the enforcement provisions of the City's Zoning Code prohibition against medical marijuana dispensaries. Currently, the City's code provides for criminal prosecution of all Zoning Code violations. However, the City has never enforced this provision against medical marijuana dispensaries. The Court's opinion in the *Anaheim* case recently raised doubt about the ability of cities to criminally prosecute the use, distribution, possession, etc. of medical marijuana where State law does not permit criminal prosecution under specified circumstances. Although it did not decide this issue, the City would like to make clear that this criminal penalty has never been, and will never be, used by the City for enforcement against medical marijuana dispensaries.

The City Attorney's Office has drafted the above proposed urgency ordinance provisions in consideration of the legal issues raised in the Court of Appeal opinion in the *Anaheim* case. These changes have been reviewed by the Development Services Department. The Planning Commission recommended adoption of the ordinance to the Council at its meeting of October 11<sup>th</sup>.

The proposed ordinance is necessary for the reasons set forth above. Furthermore, the proposed ordinance is consistent with the City's General Plan and any applicable specific plans.

### **ALTERNATIVES CONSIDERED**

If the proposed ordinance is not adopted, the City's Zoning Code provisions could be subject to legal challenge. Even with the proposed amendments, the provisions of the City's Zoning Code could be found invalid by a court of law. However, the proposed amendments represent the City's good faith effort to amend its Zoning Code in line with anticipated legal conclusions by courts in the jurisdiction in which the City is located.

The City Council also has the option of adopting the Regular Ordinance (Item No. VII.5), but not adopting the attached Urgency Ordinance. However, the City Attorney's Office recommends adopting both, as long as the City Council can make the additional urgency findings contained in the recitals to the Urgency version of the proposed ordinance, which is attached to this report.

## LEGAL REVIEW

The City Attorney's Office has drafted the proposed ordinance and recommends its adoption, in conjunction with the Regular Ordinance (Item No. VII.5).

## FISCAL REVIEW

The proposed ordinance is not likely to have any direct fiscal impact, as it codifies the current practices of the City with respect to medical marijuana dispensaries. Both the proposed ordinance and the existing Zoning Code have the potential to draw the City into litigation over the validity and content of the Zoning Code prohibition.

## CONCLUSION

The proposed ordinance will make modifications to the City's Zoning Code which are recommended by City Staff, the City Attorney and the Planning Commission, and the ordinance will become effective immediately upon adoption.

  
KIMBERLY HALL BARLOW  
City Attorney

  
KIMBERLY BRANDT, AICP  
Development Services Director

ATTACHMENTS: 1 – Proposed Urgency Ordinance

DISTRIBUTION: City Manager  
Assistant City Manager  
City Attorney  
City Clerk (2)  
Police Dept.  
Staff  
File (2)

File: 101910ZoneCodeUrgencyOrdinance	Date: 101510	Time: 10:50 a.m.
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ORDINANCE NO. 10-\_\_

**AN URGENCY ORDINANCE OF THE CITY COUNCIL OF  
THE CITY OF COSTA MESA, CALIFORNIA AMENDING  
ZONING CODE SECTIONS 13-6 (DEFINITIONS) AND 13-  
16 (ENFORCEMENT) OF TITLE 13 (PLANNING, ZONING  
AND DEVELOPMENT) OF THE COSTA MESA  
MUNICIPAL CODE REGARDING MEDICAL MARIJUANA  
DISPENSARIES.**

WHEREAS, the City of Costa Mesa Zoning Code currently defines medical marijuana dispensaries and this definition is in need of minor revisions to insure applicability of the City's zoning prohibition to all store-front and multi-user distribution of marijuana within the City of Costa Mesa; and

WHEREAS, the Fourth District Court of Appeal has indicated in dictum in its published opinion in *Qualified Patients' Association v. City of Anaheim*, Case No. G040077, filed on August 18, 2010, that criminal prosecution of possession, cultivation, transportation, distribution, sales, etc. of medical marijuana contrary to the Compassionate Use Act (Cal. Health & Saf. Code § 11356.2) or the Medical Marijuana Program Act (Cal. Health & Saf. Code §§ 11362.7-11362.83) may be preempted by State law; and

WHEREAS, the City of Costa Mesa has never criminally prosecuted medical marijuana dispensaries for any violation of the City's Zoning Code; does not intend to do so in the future; and desires to clarify the City's Zoning Code to make these facts explicit; and

WHEREAS, the City would also like to make explicit its desire to prohibit all businesses and uses, generally, that are in violation of any local, state or federal law or regulation, in order to permit and allow only those businesses and uses which are in compliance with all laws and regulations in furtherance of the health, safety and welfare of the citizens, residents and visitors to the City of Costa Mesa; and

WHEREAS, the City Council of the City of Costa Mesa hereby finds that businesses or uses in violation of the City's municipal code constitute a public nuisance, injurious to the public health, safety and welfare; and

WHEREAS, the City has not enforced its Zoning Code prohibition against medical marijuana dispensaries against individuals or very small groups of individuals for the possession, cultivation, transportation, distribution, sales, etc. of medical marijuana, even though such activities presently remain a violation of federal law; and

WHEREAS, the City intends to circumscribe its Zoning Code prohibitions to apply them to groups of three or more individuals possessing, cultivating, transporting, distributing, selling, etc. medical marijuana, which prohibition includes facilities engaging in the retail sale, dispensing or distribution of medical marijuana, when such facilities do not have an active role in the cultivation of their marijuana product or when the cultivation of their marijuana product occurs off-site; and

WHEREAS, the limitations as to the applicability of the City's prohibition on medical marijuana dispensaries are necessary due to the urban and highly suburban nature of the City of Costa Mesa, and in order to fully preserve the health, safety, welfare and general well-being of the residents, businesses and visitors to the City of Costa Mesa; and

WHEREAS, this ordinance is an urgency ordinance necessary for the immediate preservation of the public peace, health and safety, which is justified, in part, by the Court of Appeal's decision in the Qualified Patients' case, which may in the future detrimentally impact the City's ability to regulate medical marijuana businesses under its existing ordinance and thereby prohibiting the City from furthering its substantial governmental interest in systematically regulating businesses for zoning purposes.

THE CITY COUNCIL OF THE CITY OF COSTA MESA DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. The definition of the term "Medical Marijuana Dispensary" in Section 13-6 (Definitions) of Title 13 (PLANNING, ZONING AND DEVELOPMENT) of the Costa Mesa Municipal Code is hereby repealed and replaced in its entirety with the following:

"Medical marijuana dispensary. A facility or location where medical marijuana is cultivated or by any other means made available to and/or distributed by or to three (3) or more ~~one (1) or more~~ of the following: a primary caregiver, a qualified patient, or a person with an identification card in strict accordance with State Health and Safety Code Sections 11362.5 et seq. and 11362.7 et seq., which shall include, but not be limited to any facility or location engaging in the retail sale, dispensation, or distribution of marijuana for medical purposes that does not have an active role in the cultivation of the marijuana product that it sells, dispenses, or distributes, or when its cultivation of the marijuana product is off-site from the facility or location for retail sale, dispensation, or distribution."

Section 2. Section 13-16 (Enforcement) of Title 13 (PLANNING, ZONING AND DEVELOPMENT) of the Costa Mesa Municipal Code is hereby repealed and replaced in its entirety with the following:

"Sec. 13-16. Enforcement.

(a) Criminal prosecution. Any person, whether as principal, agent, or employee, violating the terms of this Zoning Code may be prosecuted as provided in section 1-33 of this Municipal Code.

(b) Criminal citation. For the purposes of this Zoning Code, a violation of the terms of this Zoning Code may be cited as either an infraction or misdemeanor pursuant to State Government Code Sections 36900 and 36901 and as provided in section 1-33 of this Municipal Code.

(c) Civil action. As an alternative to prosecution or citation, or as an additional action, the city attorney may, at the request of the development services director, institute an action in any court of competent jurisdiction to

restrain, enjoin, or abate the condition(s) or activity(ies) found to be in violation of the provisions of this Zoning Code.

(d) No criminal prosecution, citation or penalty. Notwithstanding the provisions of subsections (a) and (b) of this Section, no person shall be criminally prosecuted or cited, or suffer any criminal penalty, for any violation of the provisions of Section 13-30, Table 13-30, row 31a relating to the prohibition of medical marijuana dispensaries within the City.

(e) Nuisance. Any use, structure, or property that is altered, enlarged, erected, established, maintained, moved, or operated contrary to the provisions of this Title or any condition of approval, is hereby declared to be unlawful and a public nuisance and may be abated by the City through civil proceedings by means of a restraining order, preliminary or permanent injunction, or in any other manner provided by law for the abatement of such nuisances."

Section 3. Environmental Determination. The project has been reviewed for compliance with the California Environmental Quality Act (CEQA), the CEQA Guidelines, and the City's environmental procedures, and has been found to be exempt pursuant to Section 15061(b)(3) of the CEQA Guidelines.

Section 4. Inconsistencies. Any provision of the Costa Mesa Municipal Code or appendices thereto inconsistent with the provisions of this Ordinance, to the extent of such inconsistencies and no further, is hereby repealed or modified to the extent necessary to affect the provisions of this Ordinance.

Section 5. Severability. If any chapter, article, section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance, or the application thereof to any person, is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portion of this Ordinance or its application to other persons. The City Council hereby declares that it would have adopted this Ordinance and each chapter, article, section, subsection, subdivision, sentence, clause, phrase or portion thereof, irrespective of the fact that any one or more subsections, subdivisions, sentences, clauses, phrases, or portions of the application thereof to any person, be declared invalid or unconstitutional. No portion of this Ordinance shall supersede any local, State, or Federal law, regulation, or codes dealing with life safety factors.

Section 6. This Ordinance shall take effect and be in full force immediately from and after its passage. The City Clerk shall certify to the passage and adoption of this Ordinance and shall cause the same to be published prior to the expiration of fifteen (15) days from its passage once in the ORANGE COAST DAILY PILOT, a newspaper of general circulation, printed and published in the City of Costa Mesa or, in the alternative, the City Clerk may cause to be published a summary of this Ordinance and a certified copy of the text of this Ordinance shall be posted in the office of the City Clerk five (5) days prior to the date of adoption of this Ordinance, and within fifteen (15) days after adoption, the City Clerk shall cause to be published the aforementioned summary and shall post in the office of the City Clerk a certified copy of this Ordinance together with the names and member of the City Council voting for and against the same.

PASSED AND ADOPTED this \_\_\_\_ day of \_\_\_\_\_, 2010

\_\_\_\_\_  
Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
City Clerk of the  
City of Costa Mesa

\_\_\_\_\_  
City Attorney

STATE OF CALIFORNIA )  
COUNTY OF ORANGE ) ss  
CITY OF COSTA MESA )

I, Julie Folcik, City Clerk and ex-officio clerk of the City Council of the City of Costa Mesa, hereby certify that the above and foregoing Ordinance No. 10-\_\_ was introduced and considered section by section at a regular meeting of said City Council held on the \_\_\_\_ day of \_\_\_\_\_, 2010, and thereafter passed and adopted as a whole at a regular meeting of said City Council held on the \_\_\_\_ day of \_\_\_\_\_, 2010, by the following roll call vote:

AYES:

NOES:

ABSENT:

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the City of Costa Mesa this \_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
City Clerk and ex-officio  
Clerk of the City Council of the  
City of Costa Mesa

RECEIVED  
CITY CLERK

2010 OCT 15 PM 12:55

CITY OF COSTA MESA  
BY \_\_\_\_\_